Supreme Court, U.S.
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In the
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.,
DOUGLAS GOLDEN, and
DOUGLAS GOLDEN

Petitioners,

v.

ARKANSAS STATE GAME
AND FISH COMMISSION; et al,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

1. Are the director and the board of commissioners of a constitutional state agency of the State of Arkansas "employers" under the False Claims Act, 31 U.S.C. § 3730(h), for purposes of relief to employees who report their employers' violation of the Act?

2. Does a sixteen-year veteran employee of a constitutional state agency have a vested property interest in his employment and is he entitled to due process?

3. Can the director and the board of commissioners of a constitutional state agency abrogate their constitutional responsibilities by delegating authority to subordinates?

4. Does *Webster's Dictionary's* definition of "employer" take precedent over explicit statutory law?

PARTIES TO THE PROCEEDING

Petitioners:

This is a civil action on behalf of and in the name of the United States of America under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729-3733, and on behalf of Douglas Golden, individually, under the whistleblower protection of the False Claims Act, 31 U.S.C. § 3730(h).

Douglas Golden is a resident of Bono, Arkansas. He was the plaintiff in the lower court proceedings of this case and was the appellant before the United States Court of Appeals for the Eighth Circuit.

Respondents:

The Arkansas State Game and Fish Commission ("AGFC") is a constitutional state agency of the State of Arkansas which is charged with the responsibility of managing the state's wildlife and fishery resources for the benefit of people of Arkansas.

Steve N. Wilson was the Chief Executive Officer, or Director for the AG&FC.

Kirk Dupps, W.R. "Witt" Stephens, Bill Bridgforth, Marion McCollum, Jim Hinkle, Dr. Lester Sitzes and Forrest Wood, were AG&FC Commissioners appointed by the Governor for terms of seven years. An eighth member of the board was a non-voting commissioner and was not named in the action.

There are no other parties to this action.

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OPINIONS BELOW

The August 1, 2003, *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is reported at 333 F.3d 867 (8th Cir. 2003) and is reprinted at App. 22a. The June 25, 2003, Eighth Circuit panel opinion is reported at 333 F.3d 867 (8th Cir. 2003) and is reprinted at App. 1a-8a. The September 9, 2002, order of the United States District Court for the Eastern District of Arkansas, Jonesboro Division, is reprinted at App. 9a-21a.

JURISDICTION

The Eighth Circuit issued its *en banc* opinion on August 1, 2003. the petition for certiorari is timely in that Petitioner has filed it within 90 days of August 1, 2003. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This case involves the interpretation and application of Title VII's definition of "employer" as an agent and individuals in regard to the qui tam and whistleblower protection of the False Claims Act, 31 U.S.C. § 3730(h).

Specifically, 31 U.S.C. § 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employer

> or others in furtherance of an action under this section . . . shall be entitled to relief necessary to make the employee whole.

Title VII, 42 U.S.C. § 2000e(a) defines "person" to include individuals and corporations.

Title VII, 42 U.S.C. § 2000e(b) defines employer:

> An "employer" is defined as a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person.

The False Claims Act ("FCA") is silent as to the definition of "employer."

STATEMENT

I. Background of the Case

Douglas Golden, was an employee of the Arkansas State Game and Fish Commission, ("AGFC"), for almost sixteen (16) years when he was terminated on May 7, 1999. (App. 26a-28a) The AGFC is a constitutional agency of the State of Arkansas which is charged with the responsibility of managing the state's wildlife and fishery resources for the benefit of the people of Arkansas. Ark. Const. Amendment 35 § 1 (Michie 1987). Six months prior to his termination, Golden received an accommodation letter thanking him for his fifteen (15) years of dedicated service to the AGFC.(App. 25a) The alleged reason for Golden's termination was alleged insubordination culminating with his drinking coffee at a local pancake house restaurant while on sick leave.(App. 35a-36a)

However, Golden's supervisor admitted his (the supervisor's) continued presence at the coffee houses in the area could have been the subject of the initial complaint and investigation. Prior to his termination, Golden had been demoted from a Biologist II to a Tech III with a $3,000.00 a year cut in pay, and relieved of authority over other personnel after complaining to his superiors about misappropriated inventory.

Golden's demotion and subsequent termination parallel in time with his complaints of fraud within the AGFC to a state legislator (App. 29a-30a), his reports of abuse of alcohol by a supervisor and his report of bankruptcy fraud by a supervisor, Myron Means.

The decision to terminate Golden was actually made by lower level management personnel and rubber stamped by the Director, Steve Wilson.(App. 20a) By AGFC Minute Order #81-130 of 1981, the "actions of the Director are subject to the approval or disapproval of the Commission."(App. 24a)

Golden's lack of due process claim arises out of a procedural termination hearing held by the AGFC without due notice to Golden's attorney, thus, without the presence of Golden's attorney.

This is a civil action on behalf of and in the name of the United States of America under the *qui tam* provisions of the FCA, 31 U.S.C. § 3729-3733, and on behalf of Douglas Golden, individually, under the whistleblower protection of the FCA, 31 U.S.C. § 3730(h). The Complaint also contains a count which asserts a claim on behalf of Douglas Golden, individually, under 42 U.S.C. § 1983.

Golden named as defendants the Arkansas State Game and Fish Commission, past and present Commission members, both in their official and individual capacities.

Pursuant to the FCA, 31 U.S.C. § 3730(b)(4)(B), the United States notified the lower court of its decision not to intervene in this action. Although the United States declined to intervene, the United States respectfully referred the Court to 31 U.S.C. § 3730(b)(1), which allows the relators to maintain the action in the name of the United States; providing, however, that the "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.*

In an Order filed January 17, 2002, the district court dismissed the allegations against the AGFC pursuant to the FCA, dismissed all allegations against the individual defendants in their official capacities pursuant to the FCA, but left the claims against the individual defendants in their individual capacities pursuant to the FCA.

In the Order filed January 17, 2002, the district court dismissed Golden's § 1983 claims against the AGFC and his § 1983 claims against the individual defendants in their official capacities for damages, but left his § 1983 claims against the individual defendants in their official capacities for injunctive relief as well as his § 1983 damage claims against the individual defendants in their individual capacities.

On September 9, 2002, the district court granted Defendants' Motion for Summary Judgment on the

remaining FCA and § 1983 claims for injunctive relief against Appellee, Steve N. Wilson and the Commissioners in their official capacities. (App. 9a-21a)

Specifically, the district court held that the Director and Commissioners were not "employers" for the purposes of the False Claims Act and that Golden proffered no evidence that the Director or Commissioners, in their individual capacities, knowingly made false claims for government reimbursement. Golden alleged that the Director and Commissioners delegated their authority to lower level management personnel who participated in the alleged fraud and that the Director and Commissioners were responsible pursuant to the Arkansas Constitution and AGFC policies and procedures.

A split of authority exists concerning the definition of "employer" pursuant to the FCA. Unlike Title VII where the word "employer" is defined to include management personnel in their individual capacities, the FCA is silent. Some courts, including the Eighth Circuit, rely on *Webster's Dictionary* for the definition of the word "employer" as it applies to the FCA to include only those agents acting for such enterprise in employing persons as opposed to other courts relying on statutory language.

Other courts defer to the statutory definition of "employer" found in Title VII, 42 U.S.C. § 2000(e)(a) and (6). Title VII, 42 U.S.C. § 2000e(a) defines "person" to include individuals and corporations. Title VII, 42 U.S.C. § 2000e(b) defines employer:

> An "employer" is defined as a person engaged in an industry affecting commerce

> who has fifteen or more employees . . . and any agent of such person.

The district court also held that Golden failed to proffer evidence that the Director or the Commissioners knowingly submitted false claims to the government. Golden proffered evidence that the lower level management personnel not only knew of the false claims, but were participating in submitting false claims to the government, and that by virtue of the Arkansas Constitution and the AGFC policies and procedures, the Director and the Commissioners were responsible for the acts of fraud committed by lower level management personnel and employees.

The district court found that Golden's claims were not frivolous, vexatious, groundless or advanced for an improper purpose.

Golden appealed from the September 9, 2002 Order of the district court which granted Defendants' Motion for Summary Judgment on the remaining FCA and § 1983 claims for injunctive relief against Appellee, Steve N. Wilson and the Commissioners in their official capacities.

The panel (Circuit Judges Wollman and Beam, and District Judge John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation) affirmed. Specifically, the panel held that Golden proffered no evidence that the Appellees, in their individual capacities, knowingly made false claims for government reimbursement, that Golden's retaliation claim under the FCA failed as a matter of law as a claim can only be against an employer (31 U.S.C. § 3730(h)), and affirmed the dismissal of Golden's due process violation,

free speech and free association violations, and equal protection violation.

II. Commissioners' Authority

The Director and the Commissioners derive their responsibilities for the AGFC from Arkansas Constitutional Amendment 35 and AGFC policies and procedures, including, but not limited to, AGFC Minute Order #81-130 of 1981. Contra to the lower court's findings, and affirmed by the panel, the Minute Order states, in part, pursuant to the correction of October 5, 1981:

> This Minute Order was corrected by the Commission, meeting in regular session on October 5, 1981, in Rogers, Arkansas, to wit:
>
> "FURTHER, it is ordered that actions of the Director are subject to the approval or disapproval of the Commission."(App. 24a)

Arkansas Constitutional Amendment 35 gives authority to the Commissioners (appointed by the governor) for the oversight of the wildlife in Arkansas. Approximately 75% of the AGFC budget is derived from federal funds. According to AGFC Minute Order #81-130 of 1981, the Commissioners delegated to the Chief Executive Officer of the AGFC (also called the Director) the full responsibility and authority for all departmental administration, including hiring and firing of AGFC employees. The Chief Executive Officer, or Director, of the AGFC at the time of Golden's termination was Steve Wilson.

Golden respectfully contends that because of this discrepancy, the lower court's basis for dismissing his claims is error which was affirmed by the panel.

The Commissioners' liability is based on the failure of each one to perform their duties, omission of their responsibilities. The Commissioners are responsible for the actions of Director Wilson who approved Golden's dismissal without a true investigation or a due process hearing with his attorney present.

Pursuant to Arkansas Constitutional Amendment 35 and the minute orders or the AGFC, the Commissioners, in their professional capacities, are responsible for all aspects of the AGFC. In *Ex parte Young*, 209 U.S. 123, 155-56 (1908), this Court held that when a state official acts in violation of the Constitution or federal law, he is acting *ultra vires* and is no longer entitled to the State's immunity from suit. In effect, *Ex parte Young* creates a legal fiction: a state official stops being a state official when he does something contrary to federal law. The *Ex Parte Young* doctrine permits only prospective injunctive relief; no money damages are available. See *Edelman v. Jordan*, 415 U.S. 651, 664, 667-68 (1974).

III. Evidence of Fraud

Golden presented overwhelming evidence of fraud within the AGFC spanning his almost sixteen (16) years' employment. He submitted an affidavit from Jimmy Morgan which documented specific acts of theft and fraud within the AGFC committed by lower level management personnel and employees. Morgan's affidavit chronicled specific acts committed by Steve Wilson, David King,

Alton Case, Don Akers, Robert Zachary, Paul McCoy, Jim Hammons and Wayne Kelley, all of whom are current or former AGFC management personnel or employees and is set out word for word below and reprinted at App. 31a-34a.

> My name is Jimmy Morgan. My address is P.O. Box 283, Black Rock, Arkansas 72415. I was employed by the AG&FC from December 1989 until December 1999 as an assistant construction supervisor. My legislative title was real property management specialist.
>
> I resigned my position with the AG&FC because of a lack of cooperation from supervisory personnel. I did not fit in with the philosophy of my supervisors because I was honest; I believed everyone should be accountable for tax payer dollars. Scott Henderson, one of my supervisors, made it difficult for me to perform my duties because I informed Doug Mays, AG&FC attorney, about another employee, Alton Case, having built a garage out of AG&FC material. This matter was investigated by Bill Howell. Bill Howell kept his original investigation report. However, an edited copy, edited by Scott Henderson, was turned over to the commission which was for the benefit of the legislative audit committee.
>
> David King would order more material than was needed for a given

project. The extra material, after the project was completed, would then be taken by David King or Alton Case. After an investigation was conducted, David King was demoted and, as a result, I was promoted to King's position in 1991.

I am aware that Alton Case, an AG&FC employee, has a garage made from creosote lumber which was taken from the Lonoke Hatchery.

One of the first people I met while working for the AG&FC was Don Akers. At the time, Akers was a supervisor for the AG&FC and was the supply officer for the National Guard. Akers was peddling groceries from the National Guard out of the trunk of an AG&FC automobile. Akers offered to sell me some of the groceries, but I refused.

On another occasion, I rode to Weiner, Arkansas with Don Akers and met Robert Zachary. Robert Zachary had homemade wine in his AG&FC truck which he gave to Don Akers.

I am personally aware that Don Akers took a stainless steel fish cooker when he retired. The fish cooker had been built from GSA (Government Surplus Army) material and was mounted on a two-wheel trailer. I saw it hooked to his AG&FC truck at Mayflower, Arkansas

when he was on his way home.

Garth Choates of Bald Knob, Arkansas told me that Don Akers had given him two GSA trucks.

I am aware that the AG&FC auctioned off GSA property when the property should have been returned to the GSA.

John Welch, an assistant chief, told me to buy Steve Wilson, the director of the AG&FC, a military Jeep. I had to buy the Jeep for Wilson before I could get approval for purchasing a D7 Catepillar dozer. Although the military Jeep only cost $250.00, over $3,000.00 was spent on repairs. The Jeep was wrecked at White Rock Wildlife Management Area while being used on a personal dear hunting trip by Steve Wilson, Mike Walker and Billy White. This occurred in 1995. Attached are two exhibits relating to the Jeep.

In 1993, Paul McCoy, an AG&FC employee, was caught buying parts for his personal use which were charged to the AG&FC. Mr. McCoy was convicted and did prison time for this.

I am aware that Don Akers had Garth Choates make hatchets with the AG&FC logo on them which Akers gave to various individuals as Christmas gifts.

Because the AG&FC logo was on the hatchets, they were considered AG&FC property.

I am aware that water wells were removed off of Cypress Bayou (Farmers Home Administration land). Jim Hammons was in charge of my crew at the time. Don Akers told me not to inventory the water wells. Wayne Kelley picked up the water wells for Don Akers.

I am personally aware that AG&FC construction crews were used to pour concrete for Mike Wilson, assistant chief and federal coordinator of the AG&FC.

I was reprimanded by Scott Henderson for not buying rip rap (very large gravel) from Henderson's friend, Mr. House.

I believe that John Welch, an attorney and assistant chief of federal aid would have useful information about misuse of funds within the AG&FC.

Phil Carter, an Arkansas State Trooper, corroborated Golden's statement that he (Carter) had spoken to Golden about smelling alcohol on Robert Zachary's breath, and stating that Zachary must be celebrating Christmas early. John Carter, an Arkansas State Trooper, corroborated his brother Phil Carter's statements concerning Robert Zachary. The finding by the AGFC that no evidence existed of Zachary's being

under the influence of alcohol was merely an attempt to further discredit Golden. The lower court and the panel affirmed this discrepancy.

Dennis Elkins, age 42, became employed by the AGFC in 1991 as a fisheries technician. Elkins admitted talking to Bobby Hogue, a state representative, about not receiving as much equipment as other areas. Elkins had presented Hogue a list of equipment he needed for his area and never received it.

Gene Roebuck was a member of the senate at one time and also a member of the joint audit committee. Roebuck was a former state senator from 1997 to 2001, representing the Jonesboro area. Roebuck described AGFC losses that were charged up to burglaries from 1990 to 1997.

Hays Sullivan was appointed a commissioner of the AGFC in July of 1977, and served until July of 1984. Sullivan had recommended Golden to the AGFC, in particular, to the director, Steve Wilson. Sullivan also helped hire Wilson for the director's position. Sullivan felt very strongly that the AGFC was using the timber harvest (clear cutting) as an industry to generate income for the AGFC and that bothered him, as opposed to selective cutting that would enhance the wildlife that would benefit the sportsmen of the state.

Sullivan made statements to O. L. Richmond that he "felt like there might have been money under the table by the way some of the timber contracts were awarded." Richmond was in the timber business. Hays Sullivan told Richmond that he felt like Kurtner Lumber Company had received favorable treatment from the AGFC. Sullivan

told Richmond, without referring to Kurtner Lumber Company, per se, that he believed that contracts were awarded to certain individuals because money had "been transferred under the table." Richmond alleged that Sullivan made this statement to him approximately 1½ to 2 years ago. Richmond alleged that Sullivan told him that he knew there were favors played and there was money passed under the table. Kurtner Lumber Company is located in Newport, Arkansas, and owned by Tom Kurtner.

Robert Zachary was presently regional supervisor with the Wildlife Management Division of the AGFC. Zachary had been employed with the AGFC for 29½ years. Zachary was aware of Golden's complaints about his drinking. Zachary admitted to patronizing the Holiday Inn in uniform after Golden stopped. He also admitted to parking his AGFC truck on the Holiday Inn parking lot after Golden stopped. Zachary admitted to drinking coffee with Golden and Lynn Fair at the Holiday Inn before the complaint was made. Zachary admitted that he did not know whether the complaint was about his vehicle or Golden's, and that it could have been his. He also admitted that Golden and Fair were the only two AGFC employees who received reprimands for coming to the Holiday Inn. Zachary did not believe his continued presence at the Holiday Inn violated the directive.

Lynn Fair had been employed with the AGFC since 1972. Fair has been instructed by his supervisors, Don Akers and Robert Zachary, to charge all of his activities to federal aid.

Golden contends that he had a vested property interest in his employment due to his length of service

and continued expectancy of employment. *Pearson v. City of Paris*, 839 F.Supp. 645 (W.D.Ark. 1993). Thus, he was entitled to due process when his administrative grievance hearing concerning his discharge was held without notifying his attorney. *Pearson, supra.*

The timing of Golden's first demotion from a Biologist II to a Tech III, with a $3,000.00 a year cut in pay, occurred almost immediately after his conference with Bobby Hogue, a state representative, concerning misappropriation of AGFC funds.(App. 29a)(Hogue admits a conversation took place, but denies that fraud was the topic or even discussed.) Golden's discharge occurred soon after his response to being questioned about Myron Means' (AGFC management personnel) alleged fraudulent bankruptcy wherein Means allegedly stated he was unemployed although holding a position with the AGFC.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Finally, the Court considers whether the court of appeals' decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's supervisory power . . . ."

All of these considerations are present in this case. *Qui tam* claims filed in federal court constitute one of the most important type of claims filed. Not only does the claim bring to the attention of the courts fraud committed in the name of the federal government, but protection under the whistleblower provisions of the FCA is provided as well. Without the protection of the whistleblower provisions, a chilling effect will prevail toward employees who bring to light fraud in the various agencies. The FCA is silent concerning the definition of the word "employer." However, Title VII defines "employer" to include management personnel in their individual capacities. To accept the Title VII definition of "employer" on the one hand and to deny it on the other simply defies common logic. The lower courts' holding that state officials' laissez-faire attitude toward their responsibilities, thus their failure to be aware of the actions of their subordinates relieves them of individual liability is in direct conflict with this Court's holding in *Ex parte Young*, 209 U.S. 123, 155-56 (1908), obviously a watershed case. The lower courts' decisions rely on a play on words that:

> "To make a prima facie case under these facts, Plaintiff must show that Wilson and the Commissioners in their individual capacities knowingly made false claims for government reimbursement." (App. 15a)

This concept allows for the Director and Commissioners to absolve themselves of liability for their subordinates' conduct by simply looking the other way and/or a complete dereliction of duty. The Eighth Circuit and other courts who so hold thwart the intent and spirit of the FCA. Obviously, this was not the intent of the law

as announced in *Guadineer & Comito L.L.P. v. Iowa HHS*, 269 F.3d 932 (8th Cir. 2001), cited by the courts. The lower courts' decisions is in direct conflict with decisions from other circuit courts that interpret the term "employer" as it relates to the FCA. The lower courts also failed to give deference to Golden's due process rights acquired through almost sixteen (16) years of employment pursuant to *Pearson v. City of Paris*, 839 F.Supp. 645 (W.D. Ark. 1993).

The Court's review is warranted for all of these reasons.

I. Review Is Warranted to Resolve the Confusion Among the Lower Courts Regarding the Definition of "Employer"

In *U.S. Ex Rel. Lamar v. Burke*, 894 F.Supp. 1345 (E.D. Mo. 1995), an employee brought an action against his employer and its president alleging wrongful discharge in violation of the whistleblower provision of the False Claims Act.

The *Lamar* court held:

> The complaint contained three counts. Count I sought penalties and damages pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3733. Counts II and III were both for wrongful discharge pursuant to 31 U.S.C. § 3730(h) and state law respectively.

The parties settled Count I, and plaintiff voluntarily dismissed Count III. Count II remained.

Unlike the False Claims Act, Title VII contains a definition of "employer." An "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person." 42 U.S.C. § 2000e(b). The statute's definition of "person" includes individuals and corporations. 42 U.S.C. § 2000e(a).

Because Title VII's definition of "employer" refers to an "agent" and individuals, Courts are split over whether the statute subjects corporate supervisors to individual liability. Compare *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Lankford v. City of Hobart*, 27 F.3d 477, 480 (10th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 574, 130 L.Ed.2d 491 (1994); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), cert denied, ___ U.S. ___, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994); *Busby v. Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (collectively finding that an employee-supervisor cannot be sued in his or her individual capacity under Title VII or the ADEA) with *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10 Cir. 1993); *Paroline v.*

Unisys. Corp., 879 F.2d 100 (4th Cir. 1989), vacated in part, 900 F.2d 27 (4th Cir. 1990); *Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986) (finding that an employee-supervisor can be sued in his or individual capacity under Title VII).

In a recent decision, the Eighth Circuit looked to federal case law addressing supervisor liability under Title VII for guidance in the interpretation of analogous provisions in the Missouri Human Rights Act, Mo.Rev.Stat.Ch. 213. *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 379-81 (8th Cir. 1995). Although the *Lenhardt* court was not faced with the Title VII issue, it found compelling the analysis of those courts holding that supervisors and other employees cannot be held liable under Title VII in their individual capacities. *Id.* at 381.

The definition of "employer" under Title VII is broader than that word's ordinary and natural meaning: Title VII extends to "*any* agent" while the dictionary definition of "employer" includes only those agents "acting for such enterprise in employing persons."

Webster's Dictionary's definition for employee should not be given precedent over Title VII's 42 U.S.C. § 2000(e) statutory definition. The confusion of the lower courts should be resolved according to statutory law.

II. Review Is Warranted Because the Reasoning of the Panel and Circuit Court Decisions Is Erroneous

The panel erred both as a matter of fact and as a matter of law in finding that Golden would need to show that the Appellees in their individual capacities knowingly made false claims for government reimbursement and that Golden proffered no such evidence to support his *qui tam* claim under the FCA. This rationale violates the spirit and the letter of the law.

The Director and the Commissioners derive their responsibilities for the AGFC from Arkansas Constitutional Amendment 35 and AGFC policies and procedures, including, but not limited to, AGFC Minute Order #81-130 of 1981.(App. 23a-24a) Arkansas Constitutional Amendment 35 gives authority to the Commissioners (appointed by the governor) for the oversight of the wildlife in Arkansas. Approximately 75% of the AGFC budget is derived from federal funds. According to AGFC Minute Order #81-130 of 1981, the Commissioners delegated to the Chief Executive Officer of the AGFC (also called the Director) the full responsibility and authority for all departmental administration, including hiring and firing of AGFC employees. The Chief Executive Officer, or Director, of the AGFC at the time of Golden's termination was Appellee Steve Wilson. However, contra to the lower court's findings, and affirmed by the panel, the Minute Order states, in part, pursuant to the correction of October 5, 1981:

> This Minute Order was corrected by the Commission, meeting in regular session on October 5, 1981, in Rogers, Arkansas, to wit:
>
> "FURTHER, it is ordered that actions of the Director are subject to the approval or disapproval of the Commission."(App. 24a)

Appellant respectfully contends that because of this discrepancy, the lower courts' reasoning for dismissing his claims is error.

The Commissioners' liability is based on the failure of each one to perform their duties, omission of their responsibilities. The Commissioners are responsible for the actions of Director Wilson who approved Appellant's dismissal without a true investigation or a due process hearing with Appellant's attorney present.

Pursuant to Arkansas Constitutional Amendment 35 and the minute orders or the AGFC, the Commissioners, in their professional capacities, are responsible for all aspects of the AGFC. In *Ex parte Young*, 209 U.S. 123, 155-56 (1908), the Supreme Court held that when a state official acts in violation of the Constitution or federal law, he is acting *ultra vires* and is no longer entitled to the State's immunity from suit. In effect, *Ex parte Young* creates a legal fiction: a state official stops being a state official when he does something contrary to federal law. The *Ex Parte Young* doctrine permits only prospective injunctive relief; no money damages are available. See *Edelman v. Jordan*, 415 U.S. 651, 664, 667-68 (1974).

Indifference of management has never been a defense to incompetence or malfeasance, and should not be allowed here.

A. Evidence of Fraud

Golden presented overwhelming evidence of fraud within the AGFC spanning his almost sixteen (16) years' employment. Golden submitted an affidavit from Jimmy Morgan which documented specific acts of theft and fraud within the AGFC. Morgan's affidavit chronicled specific acts committed by Steve Wilson, David King, Alton Case, Don Akers, Robert Zachary, Paul McCoy, Jim Hammons and Wayne Kelley, all of whom are current or former AGFC employees and is reprinted at App. 31a-34a.

Golden presented sworn testimony from veteran employees of the AGFC, Dennis Elkins, Robert Zachary and Lynn Fair.

Golden presented sworn testimony from Arkansas State Senator, Gene Roebuck, and former Commission member, Hays Sullivan.

The lower courts ignore the overwhelming evidence with the rationale that the Director and Commissioners were unaware of these facts. Golden submits that the Arkansas Constitution and the AGFC's own policies and procedures confer responsibility and liability to the Commissioners and their appointed Director for acts of commission or omission. At issue is whether the Commissioners and the Director can abrogate their responsibility by delegating authority to lower level management personnel. This is the result of the holding of the lower courts which simply should not

be affirmed by this Court thereby setting precedent for other agencies.

B. Due Process Claims

The panel erred both as a matter of fact and as a matter of law in finding that Golden's rights under 42 U.S.C. § 1983 (due process and free speech) were not violated when he was demoted and discharged.

Golden was denied due process when an AGFC procedural termination hearing was held without notice to Golden's attorney and obviously without his attorney's presence.

Golden contends that he had a vested property interest in his employment due to his length of service and continued expectancy of employment. *Pearson v. City of Paris*, 839 F.Supp. 645 (W.D.Ark. 1993). Thus, Golden was entitled to due process when his administrative grievance hearing concerning his discharge was held without notifying his attorney. *Pearson, supra.*

The timing of Golden's first demotion from a Biologist II to a Tech III, with a $3,000.00 a year cut in pay, occurred almost immediately after his conference with Bobby Hogue, a state representative, concerning misappropriation of AGFC funds. Golden's discharge occurred soon after his response to being questioned about Myron Means' alleged fraudulent bankruptcy wherein Means allegedly stated he was unemployed although holding a position with the AGFC. A pattern of adverse actions that occur just after protected activity can supply the extra quantum of evidence to satisfy the requirement of a causal connection between protected

activity and adverse employment action as required to establish prima facie retaliation action. *Smith v. Allen Health Systems, Inc., et al.*, 302 F.3d 827 (8th Cir. 2002). It is possible for a strong evidence of prima facie retaliation to establish pretext of an employer's proffered reason for adverse employment action, for purpose of the *McDonnell Douglas* analysis for a retaliation action. *Smith v. Allen Health Systems, Inc., et al., supra.*

As set forth above, Respondents have offered evidence of Golden's alleged insubordination based on his fraternizing local restaurants and coffee shops. It then becomes Golden's burden to prove that this reason is merely a pretext for discrimination. Golden must come forward with affirmative evidence that were determining factors in Respondents' decision to terminate him. However, there "will seldom be 'eyewitness' testimony as to the employer's mental processes because a shrewd employer will not leave a trail of direct inculpatory evidence for the plaintiff to bring to court." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). Thus, circumstantial evidence must carry the same weight as direct evidence in employment discrimination cases.

Alleged reasons for Golden's termination conflict with his accommodation letter just six months prior to his discharge. (App. 25a)

In its Order Granting Defendants' Motion for Summary Judgment, the lower court correctly stated:

> "We do not look to federal law to determine whether such a claim exists; rather, state law or some other 'independent source,'

> amounting to 'mutually explicit understandings,' must establish such an entitlement." *Thompson v. Adams*, 268 F.3d 609, 611 (8th Cir. 2001)(App. 18a)

Arkansas joined the majority of jurisdictions and adopted a cause of action for wrongful discharge where an at-will employee is discharged in violation of a well established policy in *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). Sterling's eighteen month campaign to force Oxford's resignation constituted a constructive discharge.

The public policy of the State of Arkansas is found in its constitution and statutes. Ark. Code. Ann. § 5-53-112, which makes retaliation against witnesses, informants or jurors a class A misdemeanor, illustrates that there is public policy favoring citizen informants. This public policy is contravened when an employer discharges an employee for reporting a violation of state or federal law. See *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (1984).

Deference is normally given to Title VII precedent in non Title VII claims. Golden's claims center around the FCA and 42 U.S.C. § 1983. The lower courts' decisions violate the spirit and the letter of this Court's recent decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257,141 L.Ed.2d 633 (1998) and *Desert Palace, Inc. v. Costa.*, No. 02-679 (June 9, 2003)

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

(Any footnotes trail the end of each document)

No. 02-3409

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States of America, ex rel Douglas Golden, Appellant,

v.

Arkansas Game & Fish Commission; Steve N. Wilson, individually and in his official capacity as Director for the Arkansas State Game and Fish Commission; Kirk Dupps, individually and as a member of the Arkansas State Game and Fish Commission; W. R. Stephens, individually and as a member of the Arkansas State Game and Fish Commission; Bill Bridgforth, individually and as a member of the Arkansas State Game and Fish Commission; Marion McCollum, individually and as a member of the Arkansas State Game and Fish Commission; Jim Hinkle, individually and as a member of the Arkansas State Game and Fish Commission; Lester Sitzes, Dr., individually and as a member of the Arkansas State Game and Fish Commission; Forrest Wood, individually and as a member of the Commission, Appellees.

May 12, 2003, Submitted
June 25, 2003, Filed

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellant: Larry Joe Steele, Walnut Ridge, AR.

For Arkansas Game & Fish Commission, STEVE N. WILSON, KIRK DUPPS, W. R. STEPHENS, BILL BRIDGFORTH, MARION MCCOLLUM, JIM HINKLE, LESTER SITZES, FORREST WOOD, Defendants - Appellees: Charles W. Reynolds, DOVER & DIXON, Little Rock, AR. James Felix Goodhart, ARKANSAS GAME & FISH COMMISSION, Little Rock, AR.

JUDGES: Before WOLLMAN and BEAM, Circuit Judges, and Nangle, n1 District Judge.

OPINIONBY: BEAM

OPINION: BEAM, Circuit Judge.

Douglas Golden (Golden) appeals the district court's n2 grant of summary judgment to Appellees Arkansas Game and Fish Commission (AG&FC), Steve N. Wilson, Kirk Dupps, W. R. Stephens, Bill Bridgforth, Marion McCollum, Jim Hinkle, Dr. Lester Sitzes, and Forrest Wood (collectively, "Appellees"). We affirm.

I. BACKGROUND

Golden was employed for almost thirteen years with AG&FC before being demoted and subsequently terminated on May 7, 1999. It is undisputed that in early 1996, Golden was directed by his employer to discontinue patronage of a restaurant located in the Jonesboro Holiday Inn during AG&FC business hours. n3 Management in AG&FC changed several weeks later, and Golden resumed his visits to the restaurant during business hours. n4 He received verbal orders and two written notices to cease visiting the restaurant,

one on August 14, 1996, from his supervisor Robert Zachary and one on August 31, 1998, from Myron Means, Assistant Supervisor for District 1. Despite these notices, Golden continued to visit the restaurant. On December 2, 1998, Zachary observed Golden at the prohibited restaurant. It is these actions that AG&FC allege caused Golden's demotion and subsequent discharge for insubordination.

Golden asserts that there were other reasons for his discharge. In August of 1996, after receipt of the first written notice to discontinue his visits to the restaurant, Golden reported to Zachary's supervisor, Scott Yaich, that Zachary was intoxicated in public while on duty in an AG&FC vehicle. Yaich investigated Golden's complaint and found it to be meritless.

In addition, in 1993 or 1994, Golden and his co-worker, Dennis Elkins, met with Bobby Hogue, an Arkansas State Representative, to inform him that Don Acres, Chief of Wildlife Management, was misappropriating inventory. n5 Golden alleges that these events, along with Golden's relationship with his grandson, who was involved restaurant in the Westside School shooting in Jonesboro, Arkansas, on March 24, 1998, were the real causes for his discharge. n6

Golden filed this action on behalf of and in the name of the United States under the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733 (FCA), and included individual claims under the whistleblower protection provision of the FCA. Golden also sued individually under 42 U.S.C. § 1983.

On January 17, 2002, the district court dismissed Golden's FCA claims against AG&FC as an agency, the FCA claims against the individuals in their official capacities, the section 1983 claims for damages against the individuals in their official capacities, and the section 1983 claim against AG&FC. This left Golden's FCA claims against the individuals in their individual capacities, the section 1983 claims against the individuals in their individual capacities, and the section 1983 claims for injunctive relief against the individuals in their official capacities.

On September 9, 2002, the district court granted AG&FC's motion for summary judgment on the remaining claims. Golden appeals this second decision.

II. DISCUSSION

We review the district court's grant of summary judgment de novo. United States ex rel. Costner v. United States, 317 F.3d 883, 886 (8th Cir. 2003). Summary judgment is proper when there is no genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The non-moving party receives the benefit of all reasonable inferences to be drawn from the evidence. Krause v. Perryman, 827 F.2d 346, 350 (8th Cir. 1987).Although summary judgment is not proper where disputes exist on issues of material fact, a non-movant cannot simply rely on assertions in the pleadings to survive a motion for summary judgment. Once the moving party has met its burden of showing the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law, the non-moving party may not rest on

the allegations of his pleadings, but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists.Krein v. DBA Corp., 327 F.3d 723, 726 (8th Cir. 2003) (internal quotations omitted).

A. FCA Claims Against the Individuals in Their Individual Capacities

In order to make a prima facie case under the FCA, Golden must show that (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent. See United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa Dep't of Human Servs., 269 F.3d 932, 936 (8th Cir. 2001), cert. denied, 536 U.S. 925 (2002). The district court in its January order dismissed the FCA claim against AG&FC and against the other Appellees in their official capacities. Thus, Golden would need to show that the Appellees in their individual capacities knowingly made false claims for government reimbursement. We agree with the district court that Golden has proffered no such evidence. Thus, Golden's qui tam claim under the FCA must fail.

Golden's retaliation claim under the FCA also fails as a matter of law. As the district court noted, such a claim can only be against an "employer." 31 U.S.C. § 3730(h). The district court dismissed the retaliation claim against AG&FC and against the individuals in their official capacities in its January order, which is not on appeal here. Thus, the remaining retaliation claim is against Wilson and the Commissioners in their individual capacities. AG&FC, not Wilson or the Commissioners in their individual capacities, is Golden's

employer. See United States ex rel. Siewick v. Jamieson Sci. and Eng'g, Inc., 322 F.3d 738, 740 (D.C. Cir. 2003); Yesudian, ex rel. United States v. Howard Univ., 348 U.S. App. D.C. 145, 270 F.3d 969, 972 (D.C. Cir. 2001). Thus, Golden's retaliation claim against them in their individual capacities must fail.

B. Section 1983 Claims Against the Individuals in Their Individual Capacities and for Injunctive Relief Against the Individuals in Their Official Capacities

Golden alleges that Appellees violated his rights under 42 U.S.C. § 1983 when he was demoted and discharged. Golden claims a due process violation, a free speech and free association violation, and an equal protection violation. We agree with the district court's treatment of the meritless due process and equal protection claims. See 8th Cir. R. 47B.

We give Golden the benefit of all reasonable inferences in evaluating the district court's grant of Appellees' motion for summary judgment on his free speech and free association claims. See Perryman, 827 F.2d at 350. However, once Appellees proffered their non-discriminatory reason for terminating Golden (frequenting the banned restaurant after being told not to), the burden shifted to Golden to present evidence that the reason given for his discharge was pretextual. Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135 (8th Cir. 1999).The ultimate question is whether the plaintiff presents evidence of conduct or statements by persons involved in the employer's decisionmaking process reflective of a discriminatory attitude sufficient to allow a reasonable jury to infer that the attitude was a motivating factor in the employer's decision to fire the

plaintiff.Id. (internal quotations omitted). Golden cannot rely simply on his prima facie case, but he must submit specific evidence that rebuts Appellees' proffered nondiscriminatory reason (frequenting the banned restaurant after being told not to) for his termination. See id. He must also establish a causal connection and actual involvement by the named parties. He has failed to submit any evidence connecting Appellees with the decision to terminate him, any evidence connecting the termination to his alleged protected speech, any evidence that Appellees knew of his alleged protected speech or any evidence that the proferred non-discriminatory reason was in any manner false. Without this evidence summary judgment must be granted. Thus, Golden's section 1983 claims of free speech and association must fail.

III. CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

FOOTNOTES

n1 The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

n2 The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

n3 Apparently, AG&FC management in the Jonesboro office had been receiving complaints from the public that employees in uniform driving state cars were

spending substantial amounts of on-duty time drinking coffee and socializing at the restaurant.

n4 Golden contends that he assumed that when the management changed, the directive also changed. However, he provides no evidence that he was given explicit permission by any member of the management that he could resume his visits to the restaurant.

n5 Representative Hogue recalls the meeting with Golden and Elkins, but does not recall that they discussed misappropriated inventory. Rather, he remembers discussing a general lack of equipment available to AG&FC in that area of Arkansas. Similarly, Elkins also denies that the discussion with Representative Hogue involved fraudulent activity by AG&FC.

n6 There is absolutely no firm evidence in the record that the school shooting incident affected Golden's employment, simply Golden's stated belief that it might have.

4:01CV00350JMM

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA, ex rel,
DOUGLAS GOLDEN
PLAINTIFF

V.

ARKANSAS STATE GAME AND FISH
COMMISSION, et al
DEFENDANTS

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Plaintiff Douglas Golden was an employee of the Defendant Arkansas Game and Fish Commission ("AGFC") for almost thirteen (13) years when he was terminated on May 7, 1999. Since his termination, Golden has filed suit against the AGFC, seven of its Commissioners, and the former Director of the AGFC Steve Wilson. Upon motion of the Defendants, the Court dismissed all claims against the AGFC, as well as the False Claims Act and § 1983 damage claims against Wilson and the Commissioners in their official capacities. Defendants have filed a motion for summary judgment asking the Court to dismiss the remaining FCA and § 1983 claims for damages against Wilson and the Commissioners in their individual capacities and the claims for injunctive relief against Wilson and the Commissioners in their official capacities. Plaintiff has

responded to the motion. For the reasons set forth below, the Court finds that the motion should be granted.

Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided solely on legal grounds. Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56, The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

The inquiry is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial of disputed factual issues. Inland Oil & Transport Co. v. United States, 600 F.2d 725 (8th Cir. 1979), cert. denied, 444 U.S. 991 (1979). The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in Counts v, MK Ferguson Co., 862 F.2d 1338 (8th Cir, 1988):

[T]he burden on the moving party for summary judgment is only to demonstrate, i. e., '[to] point out to

the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339. (quoting City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted)(brackets in original)). Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Anderson, 477 U.S. at 248.

Facts

The AGFC is a constitutional agency of the State of Arkansas which is charged with the responsibility of managing the state's wildlife and fishery resources for the benefit of the people of Arkansas. Ark. Const. Amend. 35, § 1 (Michie 1987). The AGFC is governed by a group of eight commissioners, seven of whom are appointed by the Governor for terms of seven years, and one non-voting commissioner who is the head of the Zoology Department of the University of Arkansas. Id. The Board of Commissioners is an advisory, administrative and policy-making body that makes the rules and regulations for managing, conserving and protecting wildlife and fishery resources for the citizens

of Arkansas. According to AGFC Minute Order #81-130 of 1981, the Commissioners delegated to the Chief Executive Officer of the AGFC (also called the Director) the full responsibility and authority for all departmental administration, including hiring and firing of AGFC employees. The Chief Executive Officer, or Director, of the AGFC at the time of Plaintiff s termination was Defendant Steve Wilson.

Defendants' position is that Plaintiff was terminated in 1999 for "repetitious, blatant acts of insubordination and a disregard for supervisory authority" that continued for over two-and-ahalf years. (Letter from Steve Wilson to Plaintiff, dated April 19, 1999, Ex. 25 to Pl.'s Dep.) It is undisputed that beginning in early 1996, Plaintiff was directed to discontinue patronage of a restaurant located in the Jonesboro Holiday Inn during AGFC business hours. According to Defendants, Plaintiff s supervisor, Robert Zachary, became aware of public complaints about Plaintiff s afternoon gatherings and coffee breaks at the Holiday Inn with co-worker Lynn Fair.

Plaintiff stopped visiting the Holiday Inn for several weeks. However, he resumed his visits after certain management changes were made at the AGFC. Plaintiff contends that he assumed the directive regarding the Holiday Inn changed when management changed.

On August 14, 1996, Plaintiff received a memorandum from Robert Zachary again prohibiting him from entering the Holiday Inn restaurant while on duty, in uniform, or driving an AGFC vehicle. The memo further advised that failure to follow this directive

would result in disciplinary action against Plaintiff. In response, Plaintiff sent a memo to Zachary. It is undisputed that Plaintiff accused Zachary of being intoxicated in public while on duty in an AGFC vehicle. Plaintiff stated that Zachary's intoxicated state was witnessed by two Arkansas State Troopers. Plaintiff further admitted that he had disregarded Zachary's verbal warning about visits to the Holiday Inn when certain management changes were made. Plaintiff sent a copy of this memo to Robert Zachary's supervisor, Scott Yaich.

According to Defendants, Mr. Yaich launched an investigation into the allegations made against Zachary upon receipt of the memo and found no evidence to support Plaintiff's allegations. Yaich detailed his findings to Golden by memo dated January 2, 1997. Yaich stated that his investigation had, in fact, revealed a pattern of Plaintiff's attempts "to undermine the credibility and authority" of his supervisor with "vague references to unsubstantiated problems, specific allegations of wrongdoing that are entirely without merit, and misuse of supervisory authority in conducting his duties as Project Coordinator." (Memo from Scott Yaich to Plaintiff, dated Jan. 2, 1997, Ex. 16 to Pl.'s Dep.) Yaich demoted Plaintiff from Project Coordinator to the Area Manager on Bayou DeView Wildlife Management Area. Plaintiff was further placed on disciplinary probation for one year.

Two months later, Director Wilson received a complaint that Plaintiff and co-worker Lynn Fair were seen at local coffee shops during work hours. Again on August 31, 1998, Plaintiff was sent a memo highlighting complaints about AGFC trucks parked at local coffee

shops. This memo from Myron Means, Assistant Supervisor for District 1, set forth specific work hours, and stated: "At no time during the day, except possibly the lunch hour, are Commission vehicles and uniformed personnel to be seen at any coffee shop." (Memo from Myron Means to Plaintiff, dated August 31, 1998, Ex. 17 to Pl.'s Dep.)

On December 2, 1998, Zachary observed Plaintiff and Lynn Fair at the Pancake House at approximately 2:30 p.m. Plaintiff was wearing his AGFC uniform and driving his AGFC vehicle. Plaintiff claims that he had taken sick leave that afternoon to go to a dentist appointment. The monthly time sheet submitted by Plaintiff at the end of December indicates that Plaintiff had, in fact, taken sick leave. Regardless, Defendants claim that Plaintiff violated orders that he should not visit the Pancake House in uniform or while driving a Commission vehicle. After an investigation, Plaintiff was terminated by letter from Steve Wilson effective May 7, 1999.

Plaintiff provides the Court with several theories to explain his demotion and termination. First, Plaintiff contends that his demotion and subsequent termination were in retaliation for a meeting he had with Bobby Hogue, an Arkansas State Representative, in 1993 or 1994. According to Plaintiff, he and a co-worker, Dennis Elkins, informed Mr. Hogue that Don Acres, Chief of Wildlife Management, was misappropriating inventory. Second, Plaintiff contends that he was singled out by Defendant in retaliation for his statements about Robert Zachary's alleged public intoxication or because Plaintiff witnessed an embarrassing incident between Zachary and a patron of

the coffee shop where Zachary and Plaintiff had gathered. Finally, Plaintiff alleges that he was demoted and discharged because of his relationship with his grandson who was involved in the Westside School shooting in Jonesboro, Arkansas on March 24, 1998. In addition, Plaintiff has made claims against the Defendants under the False Claims Act for allegedly submitting fraudulent charges to the federal government.

False Claims Act allegation

In order to make a prima facie case under the False Claims Act, a plaintiff must show that (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent. To make a prima facie case under these facts, Plaintiff must show that Wilson and the Commissioners in their individual capacities knowingly made false claims for government reimbursement. See Guadineer & Comito L.L.P v. Iowa HHS, 269 F.3d 932 (8th Cir. 2001). Plaintiff has not provided any such proof.

Plaintiff claims that AGFC employees were instructed by their supervisors to report all of their work activities under federal aid codes even though the activities did not qualify as federal aid. He claims that he received this instruction from Robert Zachary in the 1980s, not Wilson or the Commissioners. The AGFC, Wilson, and the Commissioners in their official capacities have been dismissed from this lawsuit. Plaintiff has provided no evidence that Wilson or the Commissioners, in their individual capacities, knowingly made false claims for government

reimbursement or instructed AGFC employees to make such fraudulent claims. In fact, besides Plaintiff's own statements, there is no evidence that any AGFC employees were instructed to, or filed, fraudulent claims for government reimbursement. For this reason, Plaintiff's qui tam claim under the False Claims Act must be dismissed.

Retaliation for False Claims Act Allegations

Plaintiff alleges that he was demoted and terminated by Defendants in retaliation for talking to Representative Bobby Hogue about fraudulent activities at the AGFC. The False Claims Act provides relief to employees who report their employer's violation of the Act. It provides in part:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section ... shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h).

"Section 3730(h) provides for an action against an 'employer.'" U.S. v. Board of Regents of the Univ. Of Ca., 165 F. Supp.2d 1052, 1056 (N.D. Ca. 2001). The AGFC, not Wilson or the Commissioners, is Plaintiff s employer for purposes of this Act. Id. (citing Clemens v. Del Norte Cty. United Sch. Dist., 1996 WL 331096, at *7, n.6 (N.D. Cal. 1996); U.S. ex. Rel. Lamar v. Burke,

894 F. Supp. 1345 (E.D. Mo. 1995)). Therefore, Plaintiff cannot maintain this action against Wilson or the Commissioners in their individual capacities under section 3730(h). Further, Plaintiff admits that he has no personal knowledge or evidence that either Wilson or any of the Commissioners knew about his meeting with Representative Hogue. (Pl. Dep. at p. 355, Ex. A to Def.'s Motion for Summary Judgment) Moreover, Representative Hogue denies that any such allegations were made in the meeting with Plaintiff. (Hogue Aff. at para. 4.) Therefore, Plaintiffs claim under 31 U.S.C. § 3730(h) is dismissed.

Section 1983 Due-Process Allegation

In Count V of Plaintiff's Complaint he states that his rights under 42 U.S.C. § 1983 were violated by Wilson and the Commissioners when he was demoted and discharged. Plaintiff claims that he had a "property interest" in his job with AGFC and was entitled to due process when he was discharged. He claims that his right to freedom of speech was violated when he was demoted and discharged based upon his allegation against Robert Zachary and that his right to free speech and free association was violated when he met and complained to Representative Bobby Hogue. Finally, Plaintiff claims that his rights to freedom of association and equal protection were violated when he was demoted and discharged because he believes these actions were taken by the Defendants based upon his relationship to his grandson.

Due Process

In order to make a due process claim under § 1983, Plaintiff must show that he had a property interest in his employment with the AGFC. "We do not look to federal law to determine whether such a claim exists; rather, state law or some other 'independent source,' amounting to 'mutually explicit understandings,' must establish such an entitlement." Thompson v. Adams, 268 F.3d 609, 611 (8th Cit. 2001)(intemal citations omitted). Under Arkansas law, employment relationships are "at will." "At will" employment means that either party, the employer or employee, may terminate the relationship at any time with or without cause. There are certain exceptions to the "at will" employment doctrine, i.e., language provided in the employee handbook and public policy exceptions. Gladden v. Saline Mem. Hosp., 728 S.W.2d 501 (Ark. 1987).

Plaintiff has not set forth any reason why the "at will" employment doctrine should not apply to his case and the Court finds no reason to apply any exception to this case. The AGFC employee handbook which Plaintiff received states that his employment is "at will" and that termination could occur without a showing of cause or a hearing. (Wilson Aff, at para. 19.) Accordingly, Plaintiffs due process claim is dismissed.

Free Speech and Association

In order to prove a violation of freedom of speech or freedom of association in the employment context, a plaintiff must show 1) that he or she participated in such a protected activity, 2) that the employer took an

adverse employment action against him or her, and 3) that a causal connection existed between the protected activity and the adverse employment action. Graning v. Sherburne County, 172 F.3d 611, 615 (8th Cir. 1999)(citing Stevens v. St. Louis Univ. Medical Center, 97 F.3d 268, 270 (8th Cir.1996)). "Once a prima facie case has been stated, the burden shifts to the employer to articulate a non-discriminatory reason for the adverse employment action. The employee has an opportunity to prove that the reason given is pretextual." Id.

For purposes of this motion, Defendants concede that Plaintiff's meeting with Representative Hogue and his allegations against Robert Zachary are protected. There is no question that Plaintiff suffered an adverse employment action. However, there is no evidence of a causal connection between either of these events and the adverse employment action taken against Plaintiff. As stated previously, Plaintiff admits that he has no evidence to prove that the Commissioners knew that he met with Representative Hogue or that he made any allegations against Robert Zachary. (Pl. Dep. at p. 355, Ex. A to Def.'s Motion for Summary Judgment.) Likewise, there's no evidence that Director Wilson knew of Plaintiff's meeting with Representative Hogue. (Wilson Aff. at para. 18.)

Assuming Plaintiff has provided sufficient evidence of Director Wilson's knowledge regarding the Robert Zachary allegations and Plaintiff has stated a prima facie case against him concerning those allegations, Wilson has articulated a non-discriminatory reason for Plaintiff's termination, i.e., his "repetitious, blatant acts of insubordination and disregard for supervisory authority." Plaintiff's patronage of local coffee shops

while either in AGFC uniform, in AGFC vehicles, or during AGFC work hours after repeated prohibitive warnings is well documented in the record. Thus, it becomes Plaintiff's burden to prove that the given reason is pretextual.

As far as the Court can tell from the Plaintiff s brief and the supporting exhibits, Plaintiff has not provided any evidence, direct or circumstantial, that Wilson's stated reason for terminating Plaintiff was pretextual. In fact, Plaintiff points out that Wilson's decision to terminate Plaintiff was based upon the recommendation of Donny Harris, Chief of AGFC's Wildlife Management Division and documents compiled by Wildlife Management supervisors detailing the disciplinary actions taken against Plaintiff. Wilson testified that Harris presented him with Plaintiff's termination letter, Wilson questioned Harris about whether termination was the right decision, and Wilson signed (or stamped) the letter. (Wilson Dep. at p. 13-14.) These facts do not amount to sufficient evidence of pretext. Accordingly, Plaintiff's freedom of speech allegations against Wilson are dismissed.

In Plaintiff's Complaint, he alleges that his grandson's involvement in the Jonesboro Westside High School shootings was an additional reason for Plaintiff's demotion and termination. Plaintiff claims that his association with his grandson is protected under the Constitution and, thus, Defendants have violated his constitutional rights. Once again, Plaintiff admits that the Commissioners played no role in his termination. Further, Plaintiff argues that Director Wilson merely accepted the recommendation of Donny Harris to order his termination. There is absolutely nothing in the

record to support a finding that Plaintiff's termination or demotion were connected to his grandson's activities except for the fact that each of these Defendants may have been aware that an AGFC employee was related to a child involved in the Westside High School shootings. Without more, the Court cannot allow this claim to proceed before a jury. Accordingly, Plaintiff's freedom of association claim is dismissed.

Plaintiff also mentions an equal protection claim in his Complaint. This claim is wholly without merit and is dismissed.

For the reasons set forth above, Defendants' motion for summary judgment of the remaining FCA and § 1983 claims for damages against Wilson and the Commissioners in their individual capacities and the claims for injunctive relief against Wilson and the Commissioners in their official capacities (Docket #42) is granted. Defendants' motion for order declaring Defendants' Local Rule 56.1 Statement admitted (Docket #49) and Plaintiff's motion in limine (Docket #52) and motion to supplement (Docket #48) are moot. The Clerk is directed to close the case.

IT IS SO ORDERED this 9 day of September, 2002.

James M. Moody
United States District Judge

No. 02-3409

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States of America, ex rel Douglas Golden,
Appellant,

vs.

Arkansas Game & Fish Commission; et al.,
Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128 - 010199)

August 1, 2003

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

ARKANSAS GAME AND FISH COMMISSION
Little Rock Arkansas

MINUTE ORDER N0. 81-130
SUBJECT Administrative Procedures
DATE PASSED August 31, 1981
PAGE 1 of 1 PAGES
LOCATION

WHEREAS, the Arkansas Game and Fish Commission has been established by Constitutional Amendment 35 as a governmental entity having exclusive jurisdiction over the conservation and management of resident wildlife and fisheries resources in the. State of Arkansas, and

WHEREAS, a Director has been employed by the Commission as Chief Executive officer to be responsible for all administrative functions of the department, and

WHEREAS, the Commission's primary constitutional mandate is to function as a policy making board with an overview of budgetary, regulatory, and public relations matters, and

WHEREAS, the Commission is highly cognizant of the administrative problems which can arise from the

involvement of individual Commissioners in administrative details and personnel matters,

NOW THEREFORE, be it resovled that the Arkansas Game and Fish Commission, meeting in regular session this 31st day of August, 1981, affirms the role of the Director as Chief Executive Officer with full responsibility and authority for all departmental administration.

NOTE: This Minute Order was corrected by the Commission, meeting in regular session on October 5, 1981, in Rogers, Arkansas, to wit:

"FURTHER, it is ordered that actions of the Director are subject to the approval or disapproval of the Commission."

JH

25a

Arkansas Game & Fish Commission
2 Natural Resources Drive
Little Rock, Arkansas 72205

Steve N. Wilson
Director

October 1, 1998

Doug Golden
605 CR 113 Rd.
Bono, AR 72416

Dear Doug:

Congratulations on completing your 15th year with the Commission! Your dedication and hard work on the Commission's behalf is very much appreciated. It. is people like yourself who are the backbone of this agency and who make a major contribution toward helping the Commission carry out its responsibilities to the people of Arkansas.

I wish you the best as you continue to serve the sportsmen of this state as a career employee of the Arkansas Game and Fish Commission.

Cordially,

Steve N. Wilson Director
April 19, 1999

Arkansas Game & Fish Commission
2 Natural Resources Drive
Little Rock, Arkansas 72205

Steve N. Wilson
Director

April 19, 1999

Mr. Doug Golden
605 CR 113 Road
Bono AR. 72416

Dear Mr. Golden:

This letter is your notice of termination of employment with the Arkansas Game and Fish Commission, effective at the end of the workday on Friday, May 7, 1999.

As the result of an Administrative Investigation, on January 2, 1997, Scott Yaich, Chief of the Wildlife Management Division, wrote you a memo relieving you of all supervisory authority as Project Coordinator and reassigned you as the Area Manager on the Bayou DeView WMA. Your reassignment was a demotion from a Biologist II (Grade 19) to Technician III (Grade 16). This action was a result of a series of events/actions that were precipitated by a memo of reprimand to you from District Supervisor Robert Zachary dated August 14, 1996. You were reprimanded for failure to comply with verbal instructions to discontinue afternoon gatherings and coffee breaks in the Jonesboro Holiday Inn Restaurant and to discontinue leaving Commission trucks on the parking lot. However, the problem was

one of insubordination and subversion of the authority of your supervisors.

On August 31, 1998, Assistant District Supervisor Myron Means wrote you a memo informing you that complaints had been received regarding Commission trucks setting at the Pancake House in the afternoons. In this memo, you were instructed "At no time during the day, except possibly the lunch hour, are Commission vehicles and uniformed personnel to be seen at any coffee shop". You failed to follow Mr. Mean's instructions as District Supervisor, Robert Zachary, observed you at the Old South Pancake House on December 2, 1998 at approximately 2:23 PM. Wildlife Management Division Chief Donny Harris and Assistant Chief Bob Conley conducted an Administrative Investigation on January 7, 1999. When you were asked if you had been observed by District Supervisor Robert Zachary at the old south Pancake House on December 2, 1998 at approximately 2:25 PM and did you arrive by Game and Fish vehicle, your response was "yes while on sick leave".

These latest actions by you continue to represent examples of the repetitious, blatant acts of insubordination and a disregard for supervisory authority that has continued for a period of over 2 1/2 years. Therefore, as defined in the Commission's policy of progressive discipline, your employment is terminated because of repetitive insubordination.

You have an annual leave balance of 37 days (296 hours). As you can only be paid for 30 days of annual leave, you may take 7 days of paid annual leave prior to May 7, 1999. After your inventory items have been

checked and reconciled and you have removed all your personal property, you will receive a final paycheck through May 7, 1999 and a separate check for your annual leave balance.

Steve N. Wilson
Director

State of Arkansas
County of Lawrence

AFFIDAVIT

I, Bobby L. Hogue, having been duly sworn, do depose and state as follows:

1. My name is Bobby L. Hogue and I am self employed in Jonesboro, Arkansas.

2. Previously, for approximately 20 years, I was a State Representative.

3. I do not know Douglas Golden very well and do not know, now, that I would recognize him if I met him on the street.

4. I did have a meeting several years ago with Dennis Elkins, Doug Golden and others in which they indicated to me that they felt that the Game & Fish employees in northeast Arkansas were not receiving the equipment and support they needed. In other words, they felt that other people throughout the State were getting more equipment from the Arkansas Game & Fish Commission to run their operation than they were. They never talked to me about misappropriation of funds or fraud that I can recall.

5. I did pass on to Steve Wilson and Robert Zachary later that we, in northeast Arkansas, felt that we were not getting the equipment we needed for our management areas.

6. I have never accused anyone with the Arkansas Game & Fish Commission of misappropriating funds.

Further, Affiant sayeth not.

I have read the above Affidavit of two (2) typewritten pages and I swear or affirm that it is true and correct to the best of my knowledge and belief.

Bobby L. Hogue

SUBSCRIBED AND SWORN to before me; a Notary Public, this 17th day of June, 2002.

Notary Public
My Commission Expires: 2-27-2012

NO. 4:01 CV00350JMM

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

UNITED STATES OF AMERICA, ex rel,
DOUGLAS GOLDEN, and DOUGLAS GOLDEN
PLAINTIFFS

VS.

ARKANSAS STATE GAME AND FISH
COMMISSION; et al
DEFENDANTS

AFFIDAVIT OF JIMMY MORGAN

My name is Jimmy Morgan. My address is. P.O. Box 283, Black Rock, Arkansas 72415. I was employed by the AG&FC from December 1989 until December 1999 as an assistant construction supervisor. My legislative title was real property management specialist.

I resigned my position with the AG&FC because of a lack of cooperation from supervisory personnel. I did not fit in with the philosophy of my supervisors because I was honest; I believed everyone should be accountable for tax payer dollars. Scott Henderson, one of my supervisors, made it difficult for me to perform my duties because I informed Doug Mays, AG&FC attorney, about another employee, Alton Case, having built a garage out of AG&FC material. This matter was investigated by Bill Howell. Bill Howell kept his original investigation report. However, an edited copy,

edited by Scott Henderson, was turned over to the commission which was for the benefit of the legislative audit committee.

David King would order more material than was needed for a given project. The extra material, after the project was completed, would then be taken by David King or Alton Case. After an investigation was conducted, David King was demoted and, as a result, I was promoted to King's position in 1991.

I am aware that Alton Case, an AG&FC employee, has a garage made from creosote lumber which was taken from the Lonoke Hatchery.

One of the first people I met while working for the AG&FC was Don Akers. At the time, Akers was a supervisor for the AG&FC and was the supply officer for the National Guard. Akers was peddling groceries from the National Guard out of the trunk of an AG&FC automobile. Akers offered to sell me some of the groceries, but I refused.

On another occasion, I rode to Weiner, Arkansas with Don Akers and met Robert Zachary. Robert Zachary had homemade wine in his AG&FC truck which he gave to Don Akers.

I am personally aware that Don Akers took a stainless steel fish cooker when he retired. The fish cooker had been built from GSA (Government Surplus Army) material and was mounted on a two-wheel trailer. I saw it hooked to his AGFC truck at Mayflower, Arkansas when he was on his way home.

Garth Choates of Bald Knob, Arkansas told me that Don Akers had given him two GSA trucks.

I am aware that the AG&FC auctioned off GSA property when the property should have been returned to the GSA.

John Welch, an assistant chief, told me to buy Steve Wilson, the director of the AG&FC, a military Jeep. I had to buy the Jeep for Wilson before I could get approval for purchasing a D7 Catepillar dozer. Although the military Jeep only cost $250.00, over $3,000.00 was spent on repairs. The Jeep was wrecked at White Rock Wildlife Management Area while being used on a personal dear hunting trip by Steve Wilson, Mike Walker and Billy White. This occurred in 1995. Attached are two exhibits relating to the Jeep.

In 1993, Paul McCoy, an AG&FC employee, was caught buying parts for his personal use which were charged to the AG&FC. Mr. McCoy was convicted and did prison time for this.

I am aware that Don Akers had Garth Choates make hatchets with the AG&FC logo on them which Akers gave to various individuals as Christmas gifts. Because the AG&FC logo was on the hatchets, they were considered AG&FC property.

I am aware that water wells were removed off of Cypress Bayou (Farmers Home Administration land). Jim Hammons was in charge of my crew at the time. Don Akers told me not to inventory the water wells. Wayne Kelley picked up the water wells for Don Akers.

I am personally aware that AG&FC construction crews were used to pour concrete for Mike Wilson, assistant chief and federal coordinator of the AG&FC.

I was reprimanded by Scott Henderson for not buying rip rap (very large gravel) from Henderson's friend, Mr. House.

I believe that John Welch, an attorney and assistant chief of federal aid would have useful information about misuse of funds within the AG&FC.

Jimmy Morgan

I, Jimmy Morgan, hereby certify that the information contained in the above Affidavit is true and correct to the best of my knowledge, information and belief.

Jimmy Morgan

SUBSCRIBED AND SWORN to before me, a Notary Public, this 15th day of July, 2002.

Notary Public

Arkansas Game & Fish Commission
REQUEST FOR LEAVE

Date: 12-31-98

I, C. Douglas Golden, respectfully request your approval of leave as indicated below, to begin 8:00 A.M. on 12/31, 1998 and to conclude at 5:00 P.M. on 12-31, 1998.

Vacation	Sick	Compen-satory	Military	Jury / Witness Duty	Leave Without Pay	Birthday Holiday	Delayed Holiday Identify
Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min
	8 0						

Signature of Employee SSN (Required) Approved by Supervisor

Division:	06	Project:	0240

Holidays may be requested in whole hours only. All other leave time may be requested in 15 minute increments.
With the exception of sick leave, this form must be approved before the leave commences.
A Certificate of Illness form must be furnished for 40 hours or more consecutive sick leave.

YOU MUST NOTIFY YOUR SUPERVISOR IMMEDIATELY IF THERE IS ANY CHANCE IN THE ACTUAL AMOUNT OF LEAVE TAKEN!!

35a

Arkansas Game & Fish Commission
REQUEST FOR LEAVE

Date: 12-2-98

I, C. Douglas Golden, respectfully request your approval of leave as indicated below, to begin 12:30 P.M. on 12/2, 1998 and to conclude at 4:30 P.M. on 12-2, 1998.

Vacation	Sick	Compen-satory	Military	Jury / Witness Duty	Leave Without Pay	Birthday Holiday	Delayed Holiday Identify
Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min
	4						

Signature of Employee SSN (Required) Approved by Supervisor

Division:	06	Project:	0240

Holidays may be requested in whole hours only. All other leave time may be requested in 15 minute increments.
With the exception of sick leave, this form must be approved before the leave commences.
A Certificate of Illness form must be furnished for 40 hours or more consecutive sick leave.

YOU MUST NOTIFY YOUR SUPERVISOR IMMEDIATELY IF THERE IS ANY CHANCE IN THE ACTUAL AMOUNT OF LEAVE TAKEN!!